No. 14984

In the United States Court of Appeals for the Ninth Circuit

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

WILLIAM G. OSTLER, RESPONDENT

ON PETITION FOR REVIEW OF THE DECISION OF THE TAX COURT OF THE UNITED STATES

BRIEF FOR THE PETITIONER

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OPINION BELOW

The findings of fact and opinion of the Tax Court (R. 9-12) are not officially reported.

JURISDICTION

The Commissioner's petition for review (R. 25-26) involves an asserted deficiency of $1,292.35 in taxpayer's federal income tax for the year 1950. On December 14, 1953, the Commissioner mailed a notice of such deficiency to the taxpayer. (R. 3, 5-6.) Within 91 days thereafter (the 90th day being on Sunday), or on March 15, 1954, the taxpayer, pursuant to Section 272 of the Internal Revenue Code of 1939, filed a peti-

tion in the Tax Court for redetermination of this deficiency. (R. 1, 3-4.) On July 26, 1955, the decision of the Tax Court was entered deciding that there was no deficiency. (R. 2, 13.) On October 17, 1955, the Commissioner filed his petition for review invoking the jurisdiction of this Court under Section 7482 of the Internal Revenue Code of 1954. (R. 2, 25-26.)

QUESTION PRESENTED

Whether under Section 51 of the Internal Revenue Code of 1939 the taxpayer and his former wife were entitled to file a joint income tax return for the year 1950, notwithstanding the fact that as of December 31, 1950, they were legally separated under an interlocutory decree of divorce.

STATUTE INVOLVED

Internal Revenue Code of 1939:

> SEC. 51. INDIVIDUAL RETURNS.
>
> (b) [As amended by Sec. 303, Revenue Act of 1948, c. 618, 62 Stat. 110] *Husband and Wife.*—
>
> (1) *In general.*—A husband and wife may make a single return jointly. Such a return may be made even though one of the spouses has neither gross income nor deductions. If a joint return is made the tax shall be computed on the aggregate income and the liability with respect to the tax shall be joint and several.
>
> * * * * *

(5) *Determination of status.*—for the purposes of this section—

(A) the status as husband and wife of two individuals having taxable years beginning on the same day shall be determined—

(i) if both have the same taxable year—as of the close of such year; and

(ii) if one dφes before the close of the taxable year of the other—as of the time of such death; and

(B) an individual who is legally separated from his spouse under a decree of divorce or of separate maintenance shall not be considered as married.

* * * * *

(26 U. S. C. 1952 ed., Sec. 51.)

STATEMENT

The facts as stipulated (R. 13-24) and found by the Tax Court (R. 9-10) may be summarized as follows:

The taxpayer, William G. Ostler, is an individual with residence at Tucson, Arizona. (R. 9.) On or about February 27, 1950, the taxpayer's wife, Frances S. Ostler, secured an interlocutory decree of divorce from him. This decree became final on or about March 13, 1951. (R. 9, 10)

Prior to the calendar year 1950, during that year, and for a period of time thereafter, both taxpayer and Frances were domiciled in and residents of the State of California. (R. 9-10.)

On March 15, 1951, the taxpayer and Frances filed a joint income tax return for 1950, with the Collector

of Internal Revenue at Los Angeles, California. In this return a total of three exemptions was claimed, one for each of the principal taxpayers and one for a daughter, Mary Jane Ostler. The items respecting income, deductions, and losses stated and claimed in this joint return were computed and reported upon the community property basis. Taxpayer and Frances each had individual sources of income from their labor and ownership of productive property and property rights. (R. 9, 20-24.)

On December 14, 1953, a statutory notice of deficiency in the amount of $1,292.35, for the calendar year 1950, was mailed to the taxpayer. This deficiency resulted from a reallocation of community income to separate incomes of taxpayer and Frances. The basis for the adjustments making up the deficiency was that, under the provisions of Section 51(b) of the Internal Revenue Code of 1939, taxpayer and Frances could not file a joint return for the taxable year ended December 31, 1950, since the interlocutory decree of divorce was granted on February 27, 1950. (R. 10.)

In deciding that there was no deficiency, the Tax Court held that, notwithstanding the interlocutory decree of divorce, the taxpayer and Frances were entitled to file a joint return for the year 1950. (R. 10-12.)

STATEMENT OF POINT TO BE URGED

The Tax Court erred in holding that the taxpayer and his former life, who as of December 31, 1950, were legally separated under an interlocutory degree of divorce, were entitled to file a joint income tax return for the year 1950.

SUMMARY OF ARGUMENT

Section 51(b)(5)(B) of the Internal Revenue Code of 1939 provides that for the purpose of filing a joint income tax return an individual shall not be considered married if at the close of the year he is "legally separated from his spouse under a decree of divorce or of separate maintenance." The sole question in this case is whether the taxpayer and his former wife were entitled to file a joint income tax return for the year 1950, notwithstanding the fact that as of the close of that year they were legally separated under an interlocutory decree of divorce. The Tax Court concluded that the taxpayer and his former wife were entitled to file a joint return, pointing out that under local law a marriage is not terminated by an interlocutory decree of divorce. We submit that the question presented here depends upon construction of a federal statute which covers situations where the marriage is not, as well as situations where the marriage is, terminated under local law, and that the terms of that statute and its legislative history, as well as a long-standing administrative construction, make it clear that under the circumstances of this case the legal separation of the taxpayer and his former wife deprived them of the privilege of filing a joint return.

ARGUMENT

The Tax Court Erred in Holding that the Taxpayer and His Former Wife Were Entitled to File a Joint Income Tax Return for the Year 1950

Paragraph (1) of Section 51(b) of the Internal Revenue Code of 1939, *supra,* provides that a single return may be filed jointly by a husband and wife. For

the purposes of this section, paragraph (5) further provides that, with exceptions not relevant here, the status of husband and wife shall be determined as of the close of the year but that——

> * * * an individual who is legally separated from his spouse under a decree of divorce or of separate maintenance shall not be considered as married.

The single question presented in the instant case is whether under this section the taxpayer and his former wife were entitled to file a joint income tax return for the year 1950, notwithstanding the fact that as of the close of that year they were legally separated under an interlocutory decree of divorce. Relying upon its prior decisions in *Eccles* v. *Commissioner,* 19 T.C. 1049, affirmed *per curiam,* 208 F. 2d 796 (C.A. 4th), and *Evans* v. *Commissioner,* 19 T.C. 1102, affirmed, 211 F. 2d 378 (C.A. 10th), the Tax Court concluded that the taxpayer and his former wife were entitled to file a joint return, pointing out that under local law the status of husband and wife is not terminated by an interlocutory decree of divorce. We submit that the question presented here depends upon construction of a federal statute which covers situations where the marriage is not, as well as situations where it is, terminated under local law, and that the terms of that statute and its legislative history, as well as a long-standing administrative construction, make it clear that under the circumstances of this case the legal separation of the taxpayer and his former wife deprived them of the privilege of filing a joint return.

Since the privilege of filing a joint return was conferred, in the first instance, only upon husband and

wife, it was not necessary for Congress to provide that that privilege could not be exercised where the marriage had been terminated. Moreover, the statutory language itself shows beyond doubt that it is not necessary that the marriage of individuals be terminated before they forfeit the privilege of filing a joint return. Thus, that privilege is forfeited by "an individual who is legally separated from his spouse under a decree * * * of separate maintenance," a decree which confirms rather than terminates the marriage. The crucial term "legally separated," is used with respect to both a decree of divorce and a decree of separate maintenance. Indeed, it would have been inconsistent and arbitrary to provide that the privilege of filing a joint return should be forfeited by individuals legally separated under a decree of separate maintenance notwithstanding the fact that their marriage is not terminated under local law, and at the same time to provide that such privilege should not be forfeited by those individuals legally separated under a decree of divorce if their marriage is not terminated under local law. Furthermore, in the statutory provision that the individual shall not be considered married for purposes of the joint return privilege if he is legally separated "under a decree of divorce", the term "decree of divorce" is not qualified. It is not provided that he must be legally separated under any particular type of decree of divorce or that an interlocutory decree of divorce shall not be considered a decree of divorce. Accordingly, to adopt the holding of the Tax Court is both to impute inconsistent, arbitrary intentions to Congress and to read into the statute something which is not there.

The legislative history of 1939 Code Section 51(b)

confirms the conclusion that in speaking of "an individual who is legally separated from his spouse under a decree of divorce" Congress did not intend merely to cover situations where the marriage was terminated, i.e., where there had been an absolute divorce. Thus, in referring to the adoption of this language in 1939 Code Section 23(aa) (26 U.S.C. 1952 ed., Sec. 23), relating to the standard deduction,[1] as well as in 1939 Code Section 51(b), relating to joint returns, the Senate Finance Committee stated (S. Rep. No. 1013, 80th Cong., 2d Sess., pp. 55, 58 (1948-1 Cum. Bull. 285, 328, 330)):

* * * * *

> The new paragraph (6) contains provisions substantially the same as those contained in the last sentence of section 23(aa)(4) of existing law relating to the determination of the status of individuals as husband and wife. Under this paragraph the determination of whether an individual is married is made, for the purpose of the allowance of the standard deduction, as of the close of his taxable year, unless his spouse dies during his taxable year, in which case the determination is made as of the time of such death. The new paragraph (6) also provides that for the purpose of the allowance of the standard deduction, an individual legally separated (*although not absolutely-divorced*) from his spouse under a decree of divorce or separate maintenance shall not be considered

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[1] Not only was similar language used in various provisions of the 1939 Code, but it was expressly declared that a uniform construction of those provisions was intended. S. Rep. No. 1013, 80th Cong., 2d Sess., p. 50 (1948-1 Cum. Bull. 285, 324).

married. This is the same test as is provided in section 22(k) of the Code, relating to alimony and like payments, where spouses are *legally separated or divorced.* This provision is also intended to apply the same test as is provided in section 51(b) of the Code, as proposed to be amended by section 303 of the bill, so that the determination of married individuals will be the same for the purpose of the standard deduction as for the purpose of eligibility to make a joint return. (Emphasis added.)

* * * * *

Paragraph (5), of section 51(b) as amended in the bill, provides for the determination of status of individuals for the purpose of making joint returns. In accordance with the extension of the joint return privilege to cases in which a spouse died during the taxable year, the status determination of individuals as husband and wife in such a case is to be made as of the time of the death of such spouse. In this and in other respects the determination of status for the purpose of section 51 is the same as that provided under section 23(aa)(6), as added by section 302 of the bill with respect to the allowance of the standard deduction, except that the determination of status applies under section 51 only where two individuals have taxable years beginning on the same day.

* * * * *

A consistent and long-standing administrative construction has recognized that the statutory language "legally separated * * * under a decree of divorce,"

includes a legal separation under an interlocutory decree of divorce. Thus, in I.T. 3761, 1945 Cum. Bull. 76, the Commissioner ruled that periodic payments made pursuant to an interlocutory decree of divorce in the State of California by a husband for the support of his wife are includible in her gross income under Section 22(k) of the Internal Revenue Code of 1939 (26 U.S.C. 1952 ed., Sec. 22) and are deductible by the husband under Section 23(u). I.T. 3942, 1949 Cum. Bull. 69, holds that for the purposes of Sections 23(aa), 25(b), and 51(b) of the Internal Revenue Code the parties named in an interlocutory decree of divorce in the State of California are not "considered" as married because of the legal separation. See also I.T. 3934, 1949 Cum. Bull. 54, I.T. 3944, 1949 Cum. 56 and Rev. Rul. 55-178, 1955-1 Cum. Bull. 322. The Commissioner's position in this case and in the above rulings is urged with a view to the symmetry and over-all equity of the revenue laws.

While most of the opinion of the Tax Court in *Eccles* v. *Commissioner, supra,* was devoted to a discussion of the fact that under local law a marriage is not terminated by an interlocutory decree of divorce, that court did make two other observations which deserve some comment.[2] First, that court attempted (p. 1054) to draw an analogy between the order for alimony *pendente lite* and an interlocutory decree of divorce. But the statutory language refers to "a decree of divorce or of separate maintenance" and an order for alimony

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[2] The Tax Court also referred to language in the Treasury Regulations dealing with the tax treatment of alimony payments. This language, however, was contained in certain examples which did not purport to be all-inclusive.

pendente lite clearly is neither. Second, the Tax Court suggests (pp. 1053-1054) that the statutory language here in issue should be construed consistently with the language of the estate tax "marital deduction" provision contained in 1939 Code Section 812(e) (26 U.S.C. 1952 ed., Sec. 812.) But, the legislative history of the provisions of Section 812(e) manifests an opposite Congressional intent. Thus, while, as we have previously shown, Congress intended the statutory language "legally separated * * * under a decree of divorce or of separate maintenance," as used in 1939 Code Section 51(b) (and in certain other enumerated sections not including Section 812(e)), to apply to individuals "although not absolutely divorced," the Senate Finance Committee explained its use of the term "surviving spouse" in Section 812(e) as follows (S. Rep. No. 1013, part 2, 80th Cong., 2d Sess., pp. 6-7 (1948-1 Cum. Bull. 331, 335)):

> A legal separation which has not (at the time of the decedent's death) *terminated the marriage* does not affect such status for the purposes of Section 812(e)(1). (Emphasis added.)

On the other hand, a legal separation under a decree of divorce or of separate maintenance does affect the status of a taxpayer as far as being "considered" married under Section 51(b) and the other certain other enumerated sections is concerned.

CONCLUSION

The decision of the Tax Court is incorrect and should be reversed.

Respectfully submitted,

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